United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

74 1168

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Pg 5

In the

UNITED STATES COURT OF APPEALS
For the Second Circuit

Case Nos. 74-1168
74-1283

NATIONAL ASSOCIATION OF INDEPENDENT
TELEVISION PRODUCERS AND DISTRIBUTORS,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

WESTINGHOUSE BROADCASTING COMPANY, INC.,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

INTERVENORS' SUPPLEMENTARY APPENDIX

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
ATTORNEYS AND COUNSELLORS AT LAW
345 PARK AVENUE, NEW YORK, N.Y. 10022

10

INTERVENORS' SUPPLEMENTARY APPENDIX

TABLE OF CONTENTS

Exhibit 5

GROUP W PRODUCTIONS, INC.

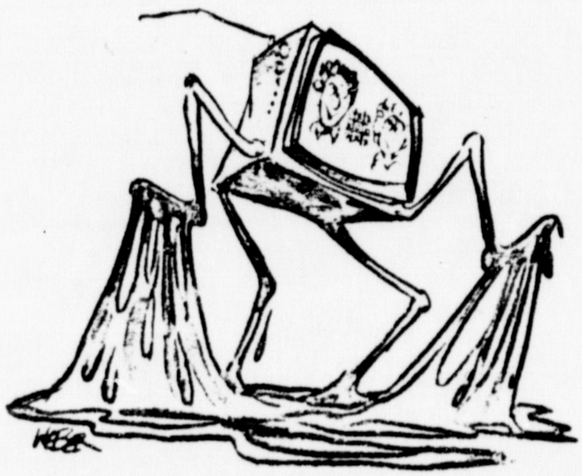
Title	Number of Episodes	Approximate Cost per Episode* Under $40,000	$40-50,000	$50-60,000
NORMAN CORWIN PRESENTS	26		X	
DAVID FROST REVUE-I	26			X
DAVID FROST REVUE-II	26			X
DOCTOR IN THE HOUSE	78	(distributed in U.S. by Group W Productions		
TOM SMOTHERS' ORGANIC PRIME TIME/SPACE RIDE	13	X		
THE STREET PEOPLE	26	X		
RON MAGERS ELECTRIC IMPRESSIONS	26	X		

* Including all production and distribution costs

Report from a Quagmire

After a season and a half, the FCC's Prime-Time Access Rule seems to have produced nothing but problems

By Richard K. Doan



The Federal Communications Commission, the Government's regulator of the broadcasting industry, has its own little Vietnam to get out of gracefully and with honor.

It's called the Prime-Time Access Rule.

It all came about innocently enough: the seven-member commission simply wanted to curb the three big TV networks' "domination" of prime evening time. At first, FCC staffers proposed a 50-50 scheme, turning over half of these hours to independent, or non-network, program producers. The commission decided this was too drastic and settled for a seemingly mild compromise: one half hour a night on stations in the country's 50 biggest markets.

Section 73.658 (k) of the FCC rules, as Prime-Time Access is officially known, went into effect Oct. 1, 1971. The rule got its name from the fact it was supposed to provide access to the airwaves for program producers outside the networks. This, the FCC contended, would stimulate program "diversity."

A season and a half later, the rule has become a regulatory quagmire, almost wholly counterproductive as a creative stimulant, highly discriminatory in its industry impact, and hopelessly inflexible as a guideline.

Specifically, it has led to an appalling proliferation of cheaply produced game shows and revivals of long-gone network attractions. Thanks to FCC fiat, TV logs in city after city read like a page from the past: *Truth or Consequences*, *This Is Your Life*, *Stump the Stars*, *Juvenile Jury*, *The Price Is Right*, *What's My*

Line?, *Hee Haw*, *Lawrence Welk* and others.

Indeed, probably the biggest access success of all (in 43 of the 50 biggest markets) is the frenetic *Let's Make a Deal*, characterized by one New York TV critic recently as "a show of such unbridled avarice that Mafia members are said to turn it off in disgust."

But while that may be the worst of it from the viewers' viewpoint, there is a graver consequence to the relationship of government and broadcasting. "There's no question we're in the programming business," says FCC Chairman Dean Burch, who has received a deluge of requests for waivers to the rule—for the Miss America Pageant, the Summer Olympics, among others. The commission has found itself slowly but surely being dragged into direct involvement in programming, a role the FCC historically has sought to steer clear of.

There have been side effects, too. Many stations are cramming up to six and a half minutes of commercials into the access half hour where the networks had only four.

Major Hollywood program suppliers have lost $50 million a year in network production lopped off by the rule, according to a study by the FCC's own "communications economist," Dr. Alan Pearce. Many of the access programs are produced outside of Hollywood, but if the commission imagined the rule would give birth to new programming enterprises, such hopes have faded. Dr. Pearce told TV GUIDE: "I don't know of a single company that has gone into business as a result of the rule."

NBC says the FCC cutback in its prime time not only has cost it millions, but has made it harder to book specials. NBC officials claim they scheduled fewer this season—an estimated 60-70; in 1970 the network had 120 specials. The viewers are the losers, they note.

How could the FCC have failed to foresee some, if not all, of these outgrowths of the rule?

That's what a lot of people in TV wonder, too.

Especially in view of the fact that Prime-Time Access, far from being an overnight regulatory concoction, was the culmination of a massive 10-year FCC study of network "programming practices."

It all turned out so badly, it appears, because a majority of the FCC members *over*estimated broadcasters. They seemed to believe that local TV managements would provide better, more diversified programming if only they had the opportunity.

The business, of course, doesn't work that way.

When the networks gave up 7:30-8 P.M. (ET) each evening, their 50 biggest outlets (the only ones ordered to abide by the rule) did what came naturally. With rare exceptions they hurried out and filled the time slot with the shows that would get the biggest audiences.

Many stations smartly opted for "all family" fare like *Lassie*, *Wild Kingdom* and *Circus!*

About a third of the stations "stripped" available diversions like *To Tell the Truth* (20 markets) and *Truth or Consequences* (9) four or five evenings a week.

Among 150 network affiliates in the 50 largest markets, only nine stations aired news across the board at 7:30 and only one (WCVB in Boston) appropriated nightly time for "public affairs."

True, an ad-agency survey turned up 62 different syndicated series kicking around in access time. That's the sort of diversity offered by "assorted ice creams" on a restaurant menu.

A couple of these even have won passably good notices from the critics. The New York Times' John O'Connor picked the British-made *Adventures of Black Beauty* and David Wolper's *The* →

continued

Explorers as "a few, pitifully few, bright spots" in the 7:30 picture. But *Black Beauty* ran in only six of the top 50 cities and *Explorers* in five.

The aspect of the rule that has led the FCC into a regulatory thicket is its ban on two types of programming that stations originally grabbed to fill the access time: network reruns and movies that have been seen locally on TV in the past two years.

The movie ban, for instance, has embroiled the FCC in a question defining a "feature film." Does it include "movies" made for TV and never shown in theaters? If so, why isn't *Dragnet*, say, a 30-minute movie?

Abashed by the low-grade fare that their own ruling has encouraged, the FCC has eagerly granted waivers to the sort of programs they had hoped to encourage in the first place.

Example: *Wild Kingdom* was exempted from the rerun ban because it's a "factual presentation"; but *Lassie* was denied a waiver. The *National Geographic* documentaries at first were refused a waiver—but later granted one because they're factual, too.

Example: reruns of the BBC's *Six Wives of Henry VIII* were okayed as "distinctive and meritorious," but the FCC declined ABC's request for extra Olympics coverage.

Such adjudicating between one program and another alarms many people.

One of them is the FCC's chairman, who opposed the rule from the start but was outvoted by his colleagues. The waiver situation alone, Burch says, is "just ridiculous." But the whole controversy raging over the rule at this point, he said, boils down in one respect to this: "Those profiting from it are for it; those losing money are against it."

It's generally agreed in the industry that that's the case. The big-city stations are cashing in; stations in smaller localities—where budgets are smaller and sponsors harder to find—are losing money. Non-network stations, free to run all the network cast-offs they wish, are reaping a ratings and revenue harvest. Some marginal UHF stations are also grabbing bigger audiences with off-network shows and movies.

The rule has been a boon also to one of the networks. It enabled ABC, traditionally third in a three-way race, to unload less popular, lightly sponsored shows and attain better "parity" with CBS and NBC.

And finally, of course, the access era has been a bonanza for a handful of producers, notably Goodson-Todman, the once ailing game-show kings (*Line*, *Secret*, *Truth*, etc.), now once again in the chips; and Monty Hall, whose *Let's Make a Deal*, for all its esthetic sins, is access time's hit.

For all the evidence against the rule, its supporters within the FCC are not ready to scuttle it.

They've ordered a full-scale review of its pros and cons and frankly hope to salvage it.

Countless notions for making the rule work have been proposed:

Limit stations to 21 hours a week of network fare, but let them apportion it nightly to suit themselves (from Commissioner Robert E. Lee).

Encourage early-evening children's shows by exempting them from the rule (from Commissioner Nicholas Johnson).

Exempt programs aimed at minorities (from the FCC's first black member, Benjamin L. Hooks).

Limit network programming even more —to, say, two and a half hours nightly, and apply this limit to all cities, not just the top 50.

Extend the ban on network reruns and movies to the independent stations ("and *then* let's see how strong *they're* for the rule," suggests Chairman Burch).

Exempt news and public affairs.

Make stations devote one or two half

hours or even all of their access time to locally produced programs.

Then there are proposals like turning back the time to the networks, stipulating that they must devote the restored 30 minutes, or its equivalent, to prime-time news and public affairs.

A Hollywood labor union's campaign for a cutback in network reruns—an issue on which the Administration has publicly sided *against* the networks—has become a factor in the access-time debate. One speculation: the FCC might void the access rule in return for a reduction in network reruns. That idea gives networkers the shudders. They'd like their half hour back, all right, but not at the cost of more first-run shows.

Chairman Burch's feeling is that his fellow commissioners face a basic question. "They've got to decide," he says, "*what* it is they're trying to accomplish." If it's more locally produced programming, he suggests, "then perhaps we'd better say so." But if it came to that, he added, the few syndicators profiting from the rule would also turn against it, as would, doubtlessly, the stations themselves, "and *nobody* would be in favor of the rule *except* the commission."

Whatever the outcome, the networks have resigned themselves to living within the rule at least through next season. Some industry quarters gloomily foresee no repeal, for all the rule's flaws, simply because a regulatory agency hates to admit a major mistake.

Dr. Pearce, as the FCC's top in-house adviser on access time, professes to carry no torch for the edict but intimates that it will survive. Some of its supporters, he notes, argue that the rule ought to be given a five-year trial. Why it should need that long to prove its worth—when most network shows get only 13 weeks—eludes him.

Anyway, he smiles, "Five years from now, people will probably be asking, 'Prime-time access? What's that?' " END

ATTACHMENT C

(Address before the New York Chapter of the National Academy of Television Arts and Sciences)

THE PRIME TIME ACCESS RULE: SEPARATING FACT FROM FICTION

by

BURT ROSEN

PRESIDENT

WINTERS/ROSEN PRODUCTIONS, INC.

THURSDAY, SEPTEMBER 14, 1972

AMERICANA HOTEL, NEW YORK

Last Sunday night, a potpourri of the first 25 years of television flashed before our eyes -- it was preceded by a day of amazing technical coverage of the Olympics -- and on Monday another network season was upon us. It adds up to a rather striking reminder that in the last quarter of a century television has become the most informative and powerful means of communication in the history of mankind.

Television has taken us to the depths of our oceans, through the bamboo curtain, above the cosmic ridges of the moon's surface, and from Milton Berle to Archie Bunker.

Yet television today still finds itself searching for its own image -- and that's the way it should be. Television has many images and its growth should never be stunted, either creatively or technically.

All of us here today are involved in this medium that must for its own growth development -- constantly change. And the change that resulted from a recent ruling of the FCC has created a great deal of controversy. I suppose it should, for it is one of the most important pieces of legislation that has been enacted in the last 25 years.

Today, I would like to try to separate the fact from the fiction concerning the prime time access rule.

Incidentally, this October, the prime time access rule will go into full effect in the industry for the first <u>time</u>. Contrary to published statements by the major studios, this is the first real test. The last year the rule was in only partial effect and was

-- diluted by the granting of waivers

-- maligned by massive propaganda attack.

Regardless of this barrage of negativism independent production companies fought and made great strides in programming, against these odds.

Perhaps the greatest wolf-cry I have heard concerning the access rule deals with the very real unemployment problems confronting all of us. The press has given a great deal of print to the rise of unemployment in Hollywood and places the blame at the door of the access rule.

This is pure fiction.

First of all, Hollywood no longer exists. Therefore, the term "Hollywood Unemployment" is a contradiction within itself.

Hollywood is everywhere, Hollywood is where creative people congregate to put a little bit of magic on film or video tape.

Hollywood today is New York, Los Angeles, London, Paris, Toronto, Rome -- again Hollywood is everywhere.

I mention this only to point out that industry problems can not be isolated in one location.

O.K., now down to specifics.

Is it the prime time access rule that has created unemployment in the industry? The answer is no -- and the facts speak for themselves.

Fact: 21 half hours, which were formerly considered network prime time, are presently being filled by 49 different programs, in both 1/2 hour and 1 hour form. Prior to the prime time access rule, 504 half hours of original job producing programming were produced for those 21 time periods. The 72-73 season will see independent producers offering over 1500 original 1/2 hours of programming which constitutes an increase of almost 3 times the total amount of production which filled the same time periods ~~prior to the prime time~~ access rule.

The facts clearly show that the prime time access rule brought an increase in employment throughout the entire industry, not the decrease that opponents of the rule propagandize. What then has caused unemployment? The accepted repeat show pattern in the industry is one of the crucial points. The number of original episodes produced in a series has now been reduced from the 39 episodes of ten years ago to the 24 of today.

Another reason is that the major studios have sold their libraries of old motion pictures and 20 half hours a week of prime time will be filled with these motion picture reruns. Using 40 weeks as a modest estimate, so as to account for preemptions, and not including the proposed ABC Monday night movie, which is scheduled to follow the post football period, this constitutes well over 800 half hours of prime time programming that would otherwise ease the unemployment problem.

So, add it all up, the reduction of original episodes in a series, the large amount of old motion pictures programmed -- not to be confused with motion pictures produced for television, and you have a good deal of the answer to the unemployment problem.

Another piece of fiction.

The careless accusation that the prime time access shows are mostly game shows. The facts again prove this false. 49 Programs are being produced for the new season. They cover the full spectrum of program types.

13 are game shows

11 dramatic series

7 straight musical shows

5 comedy variety programs

4 situation comedies

2 animated programs

-- as large a diversification of programs as on any network.

And still more fiction. The majority of prime time access programs are produced outside the U.S.

Fact. Only 15 of the 49 programs are produced outside the United States. This is not disproportionate to the situation as it existed prior to the rule.

Continuing to separate fiction from fact, it has been stated that broadcasters and station management are opposed to the prime time access rule. The fact is that over 80 stations across the U.S. have banded together with the sole purpose of "fighting for what they think is important, the prime time access rule." These are the stations that have not been coddled by structured programming and have found it essential to attract audiences to stay competitively alive.

Fiction. Advertisers are not supporting the prime time access rule. Again the facts:

No advertiser subsidizing a show in the 1971-72 season has abandoned his involvement for this season. -- In fact, there are more advertisers taking part in prime time access programming than during the first experimental year of the prime time rule.

The detractors of the rule claim that the quality of programming motivated by the prime time access rule is inferior. Well, I believe that quality is subjective much like beauty and truth, quality is in the eye of the beholder.

But if we are to advance our argument and accept the traditional reading that quality is defined by those series that receive renewal, better than 60% of the series that are being produced for the 72-73 season -- and inspired by the prime time access rule, are either in their second year of production or have been around for longer than that.

In contrast, one network premiered seven series for the 1971-72 season, none of which will be on the air in the 1972-73 season. A comparison, therefore, of 60% continuances of prime time access programs, as opposed to zero % for one network and not a great deal higher percentage on the other two.

It is important to note several innovative programs that have been spawned by the rule. In fairness Paul Sills, and a tremendously talented group of actors who transferred Broadway to video tape, I must mention Story Theatre first. Critically acclaimed as bright and fresh, this series truly represents the innovativeness possible with the prime time access rule.

But it is not alone.

Norman Corwin came back to television through Group W.
Circus is capturing the almost lost art of the speciality act.
Jonathan Winters has a second chance.
George Kirby has his first chance.
The three nature shows: Safari, Kingdom, and Wild Life keyed to today's ecology interests.

We live, unfortunately, in an atmosphere of copy catism when a show becomes a success and breeds a flock of mirror-like programs. Look at what happened with "All In The Family" -- a successful program which gave birth to Sanford and Son, which will beget Maude which will beget Bridget Loves Bernie.

When the cycle completes itself, who gets custody of Archie Bunker, Bridget or Bernie?

This week a new organization was formed called the National Association of Independent Television Producers. Many respected industry leaders have joined this new organization. The board consists of such prominent people as:

Nick Vanoff -- President of Youngstreet Productions.
Giraud Chester -- Executive Vice-President of Goodson-Todman.

Seymour Berns -- Production Executive of Four Star International and, as you know, president, for two terms, of your organization.

Greg Garrison -- President of Greg Garrison Productions.

Allen Courtney -- President of Youngstreet Productions, program sales.

The National Association of Independent Television Producers has a firm conviction that the prime time access rule affords many great advantages to the entire television industry. They have joined together to support the rule, which provides all within the industry a great opportunity to broaden the horizons of television, and diversify programming in the spirit of progress through competition.

All of the organization's associates are in agreement that the three networks are providing great service to both the industry and the general public. We are engaged in business activities with the networks and have every intention of continuing that relationship. We do believe, however, that the prime time access rule, in its simplest terms, has provided and will continue to provide an expanded market for all production companies, and not only should be maintained, but applauded.

Historically, progress is always resisted.

Major motion picture studios and exhibitors initially resisted free television and, through legal and political action, delayed the progress of pay television. We, of the National Association of Independent Television Producers, do not intend to let that happen to the prime time access rule. There are those who always resist change and, in fact, are afraid of it, vigorously attempting to maintain the status quo. We welcome this change and are inspired by the competitive challenge.

The most important goal of the National Association of Independent Television Producers is to separate the facts from the much publicized fiction surrounding the prime time access rule.

We are resolved to fight any repeal of the prime time access rule or any watering down of the intent of the rule and will strongly fight to preserve what the organization feels is one of the most innovative steps toward progress in the constantly changing communications medium.

61. In accordance with the provisions of § 1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission. Material filed will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

I concur in the Notice of Inquiry and Proposed Rule Making. I hasten to add that this should not be interpreted as dissatisfaction with the existing rule but rather as an opportunity to review it with the expectation that the objectives of the rule may be improved.

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

I concur in the decision to initiate an inquiry into the effect and operation of the prime time access rule (Section 73.658(k) of the Commission's Rules) primarily because, as a general proposition, I favor an administrative agency's review of past regulation. However, my concurrence should not be interpreted in any way as either a repudiation of the rule or a prejudgment of the inquiry proceeding.

I would have preferred to delay the Commission's review of the prime time access rule in order to permit a more meaningful assessment of its impact during the current television season, *i.e.*, 1972–1973, when the full force and effect of its provisions become applicable. Although I have no preconceptions about the use of prime time repeat material by the networks, as the majority decision indicates, there appears to be a relationship between the prime time access rule and television "re-runs." In fact, it is even suggested that "parties may wish to prepare their comments herein with this in mind." It seems to me that a more orderly course of action would be to consolidate the prime time access inquiry with an investigation into the ramifications of a limitation on network television "re-runs."

One other matter deserves consideration. At the time the Commission adopted the prime time access rule in 1970, I indicated that I was in favor of a provision which would have exempted news documentaries from the scope of the rule. It was my belief that failure to adopt such an exemption would tend to discourage the network presentation of news documentaries. I would hope that interested parties would comment on the validity of my earlier prediction in light of actual experience under the rule.

SEPARATE OPINION OF COMMISSIONER NICHOLAS JOHNSON CONCURRING IN PART AND DISSENTING IN PART

In 1970, after years of investigation and analysis, this Commission concluded that the domination of the television program production market by the three networks required Commission action. As part of

that action, the Commission required that television stations in the top 50 markets take no more than three hours per night from the three networks. At least one hour had to come from independent producers, including the stations themselves. For at least one hour per night, there would be 150 buyers of television programming (three network affiliates in each of so markets) rather than three networks.

In the words of the Commission:

> The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated sources of mass appeal programs competitive with network offerings in prime time.
>
> In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anti-competitive" where the market is being opened through a limitation upon supply by three dominant companies.[1]

In affirming the Commission's action, the U.S. Court of Appeals for the Second Circuit commented:

> To argue that the freedom of networks to distribute and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. . . . The evidence demonstrates that despite the fairly wide range of choice available to licensees, they have consistently decided to limit themselves to one program source during prime time. Thus, while the rule may well impose a very real constraint on licensees in that they will not be able to choose, for the specified time period, the programs which *they* might wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects—the general public. (emphasis in original).[2]

Now this Commission is embarking on a new proceeding to examine the functioning of the prime time access rule, propose modifications of it, and to consider its demise. Since I would have followed a substantially different course, I am compelled to dissent.

At the outset, one should note the extreme handicaps under which this rule has functioned in the short time it has been in effect. First, the Commission substantially undercut it by permitting off network material to fill the access time during the first year of the new rule. Second, roughly 75% of all requests for "waiver" of the rule have been granted by this agency. Third, the rule has never enjoyed unanimous support either here or in the White House. (Recently the trade press reported three sure votes for repeal of the rule.) The White House continues its partisan wooing of certain segments of the Hollywood community and networks by promising favorable FCC action.

I hasten to add that I believe my colleagues when they say that no decision has been made, that the presumption favors retention of the rule, and that they are perfectly willing to listen to arguments as to why the rule should be retained and even expanded. And I believe they are going to be surprised by the degree of support the rule will command in this proceeding. I doubt that the rule will be scrapped, or that there will be a return to the status quo, and I will have more to say about this later.

[1] Network Television Broadcasting, 23 F.C.C. 2d 382, 394–95 (1970).
[2] Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 478 (2 Cir. 1971) (footnote omitted).

Another difficulty with this proceeding is the relative lack of information and analysis before the Commission regarding the basic facts surrounding this rule. As I have said over and over again. I believe this Commission simply must have a policy planning and analysis capability to provide the information necessary for rational decisionmaking. I would have hoped that this agency might have an analytic capability for an ongoing analysis of the structure of the television industry. Instead, we rely on not very systematic splurges in the Delphi technique, and we usually ask only those who have an economic interest in a policy outcome. But with the understanding that what follows is scarcely better than speculation, I think it useful to examine the effects of the rule on the principal groups affected by it.

Consumers. "Consumers" is the economist's euphemism for the viewing public. The quick and dirty analysis is that the apparent impact of the rule viewers are watching less television, and watching stations other than network affiliates. Perhaps, one might argue that therefore, consumers are watching programs (or doing other things) that bring them less satisfaction than the network programs did, and that there is therefore a net loss of consumer satisfaction. This analysis neglects some very hard questions about changes in consumer tastes and preferences, as well as problems with comparisons of interpersonal utility preferences.[8] And the evidence to support it is ambiguous at best. Counterbalanced against it is some evidence of increased choice, and more local programming. There is apparently some evidence of less network news and public affairs, and children's programming being deferred to later in the evening.

Networks. The dollar and cents effect appears minor, except that ABC, which supports the rule, seems to have been helped competitively.

Top-50 market network affiliates. This group appears to be better off financially as a result of the sale of commercials in purchased programming, rather than the revenues from network programs.

Smaller market affiliates. The networks might have elected to program this group for their affiliates in markets below the top 50. They choose not to. As a result, these stations have been adversely affected, although less than might have been expected.

Independent stations. There seems no doubt that these stations have been helped, in that they are now competing on a more equal footing with affiliates.

Program producers. Those who produce programs for the networks have probably been hurt; those who produce independent programming have been helped. There seems to be more imported programming in prime time—for whatever reason. And the overall budget for program production may have declined as lower cost programming is produced and shown.

The FCC. The objective of the rule—deconcentrating the television program production market—seems to have been achieved, although the magnitude of that achievement in the scheme of things is in question. The administration of the rule has created endless headaches, and simplified FCC administration plays no small part in generating the present proceeding.

My own approach to this proceeding would have been to take a substantially different course. The majority is, in effect, conducting a "go-no-go" proceeding on a rule that is barely into a trial period. It sets rigid schedules for consideration, without knowing whether it or other parties are likely to be in a position to make a rational policy choice. The majority also apparently believes that it makes sense to consider a complete return to the network power situation that existed prior to 1970. Unless something has changed since 1970 in the basic competitive relationships in the television industry, I don't see how the Commission can return to that unsatisfactory situation. I see no evidence that such a change has occurred. The majority cites none.

Former Commissioner Cox, in his usual insightful way, predicted our current position when concurring in the adoption of this rule in 1970:

> If [the rule does not have the desired result], I think the networks and their affiliates may face even more drastic action. As indicated by its filings in this proceeding, the Department of Justice has serious concerns about the state of the market for television programming. If the Commission waters down its action here, or if the new rule does not in fact open up the market, then I think it possible that the Department will proceed under the antitrust laws to apply the policies developed in the motion picture industry to broadcasting. Or the Commission itself, if faced with the permanent prospect of a slowly constricting program production industry, may decide that the only alternative is to attempt some kind of detailed regulation of the networks' program practices.
>
> * * * * * * *
>
> I therefore hope that, after a necessary period of readjustment, the rule we have adopted will generate a substantial flow of new programming for sale direct to stations and cable systems, without passing through the network selection process. If it does, I think we will have a healthier television industry. If it does not, then I fear that the industry may very well undergo very serious changes in form and character.[3]

There is an antitrust suit pending in California, which followed an FCC waiver of the prime time access rule in major part for the first year, combined with an FCC stay of other aspects of its action which remained in effect for about a year after the rules were affirmed in court. I am not sure it is cause for industry celebration that the FCC is considering abandoning rules adopted to deal with a serious competitive problem.

I would not have turned this proceeding into a "go-no-go" rulemaking, nor would I impose a rigid decision making schedule, when it is not known that the facts necessary for a rational decision are going to be available. And if the rule is to be abandoned, it must be replaced with a substitute calculated to meet the problem of network power, and designed to accomplish more than would be accomplished if the rule were retained. It was for these reasons that I made certain suggestions to my colleagues for areas of inquiry to consider alternatives to the rule. Some were incorporated and I need not dwell on them. Many were not and I want to discuss them here in the hope they will generate thought and perhaps future consideration.

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[3] Network Television Broadcasting, 23 F.C.C. 2d 382, 427–28 (1970).

Some concern was expressed that a more thorough proceeding would be delayed. But surely a graduated set of response dates would permit all the majority seeks in terms of time schedule.

To introduce the subject areas I believe warrant comments and inquiry, I should like to note some views expressed in 1970, at the time the prime time access rule was adopted. In the only telling portion of his dissent, Chairman Burch, in an opinion joined by then Commissioner Wells, said:

> [R]ather than spending years on a rule of this nature, the Commission must concentrate on the obvious alternatives which have a different economic base and thus make a genuine contribution to diversity. These alternatives do exist and have not yet come to fruition.
>
> First there is subscription television, which has a different economic base and and can present programming that is not necessarily designed for a mass audience and will still be economically attractive for an entrepreneur. There is cable casting, a technology which makes multiple channels available and which by its very nature changes the entire economics of programming. There is the noncommercial educational television system, which, with sufficient and appropriate funding, can make a tremendous contribution to diversity.[4]

Noble words and an inspiring program for Commission action. I might have endorsed it myself; it is certainly consistent with my oft-expressed preference for competitive solutions rather than regulatory ones. The statement seems to acknowledge that a serious problem exists. The only question is the best solution and how to bring it about.

But what has happened in the past two years? Subscription television, shackled with restrictions, is still non-existent, and the thrust of Commission policy is toward ever more stringent restrictions. Cable television is strait-jacketed in a policy born of a political deal calculated to blunt its promising competitive benefits—not to mention the morass of more than 1000 applications pending and stymied here. And public broadcasting is suppressed in a political power play and capture to which I heard no protest from the Commission majority. In each of these areas, the FCC abandoned any thought of a leadership position. I do not oppose the consideration of alternatives so long as it is not done as mere chicanery to effect delay and postpone solutions opposed by powerful interests.

If the problem, most broadly stated, is network domination, and if there is still interest in discussing alternatives, let them be considered. What follows are ideas. The majority refused even to include them in its notice. I neither support nor oppose them. But I do think they are worthy of inquiry.

(a) As an alternative means of increasing the number of buyers for television programming, and increasing the diversity of programming available to viewers, UHF stations (and vacant or unassigned UHF allocations) could be realigned into stations with significantly higher power, capable of serving wide regions, with the possibility of attracting audiences to compete with network affiliates, and the possibility of interconnecting them into a new network.

[4] Network Television Broadcasting, 23 F.C.C. 2d 382, 416 (1970).

(b) Networks could be required to allow every station in the market to bid for network programming on a per-program basis, giving every station an opportunity to acquire network programming. Independent producers would also compete for station buys without having to face a fixed network affiliation for major stations in the market.

(c) Networks could be required to allocate their prime time programming on a pro rata basis among all the stations in the market. For instance, if there were six commercial stations in the market, and three networks each programming four prime time hours per night (84 hours total network prime time per week), no station could receive more than two network hours per night, or 14 hours per week. The economic benefits of networking would be spread among *all* stations in the market UHF and VHF alike. Independent producers would also have a prime time market comparable to networks. New stations coming on the air would have an assured source of programming.

(d) Networks could be required to program no more than 25% reruns per year. This question is directly related to issues and questions concerning the prime time access rule, and should be considered with it.

(e) Networks could be required to divest themselves of television program production facilities and talent agencies as well as any remaining syndication activities domestically or in foreign markets. This agency has apparently made an informal decision, never actually considered by the Commissioners, to do nothing about the Department of Justice suit against the networks, although arguments are being made that the subject matter of the suit is a matter within the FCC's primary jurisdiction. I dislike the continuing erosion of the FCC's power to affect the industries it regulates, but certainly there is no more powerful argument for that erosion than inaction, or action that fails to meet public interest needs, whether it be under the Communications Act or the antitrust laws.

(f) A final alternative could involve a seeming strengthening of the networks' monopoly position in an effort to, in fact, reduce it. One of the oft-overlooked reasons for the "quality" of the BBC's programming is that it is not one network but two. Thus, the "opportunity cost" of putting on minority appeal programming is virtually eliminated. (Opportunity cost is an economists' expression for what you lose by choosing a particular course of action. When an American commercial network chooses to put on programming that does not maximize audience it not only loses the production costs of that program, it also loses the "opportunity" to make the much greater revenue that a mass appeal program would create.) If a diversity of programming is what is desired, that can be created by creating a monopoly as well as by eliminating one. For example, if a means could be found whereby an individual network not only could, but would be required to, program every *station* in a given market, the net effect might well be *more* diversity than that created by three networks, each trying to copy each other's efforts to attract the entire audience (and ending up with about one-third each). Mass appeal programming would undoubtedly go on one, two, or three of the channels. But even it would be counter programmed—that is, sports on one, a movie on another, and so forth. And the remaining channels

would undoubtedly be programmed with minority appeal programming of various kinds—in an effort to attract to television persons who would not otherwise be watching any television at all, and thereby increasing the total television viewing audience for the network. In exchange for this seeming monopoly advantage, we could require that no network could program more than one hour a day, or whatever, to reduce the barriers to entry into the networking business and increase the number of networks. If there were hours when no networks were programming at all, the proposal would, to that extent, create a market for the programming of independent producers as well.

(g) Networks or stations could be required to present a certain amount of material designed for particular groups (see section b, paragraph 52 of the majority Notice) or news and public affairs each night or each week as a condition to a recision of the rule.

These are ideas I believe relevant to any consideration of where the FCC goes with the prime time access rule. No doubt there are others. No doubt some could be rejected quickly once they were subjected to detailed analysis. I express no preferences for any. Each has a similar goal to that of the prime time access rule, however, to improve the competitive, free private enterprise functioning of the television program production market. Several alternatives approach the problem from a wholly different direction than that of the prime time access rule.

The FCC ought to be in the business of freely exploring, analyzing, and testing the alternatives for the benefit not only of the viewing public but the industries and unions involved as well. Its refusal to do so prompts this dissent.

*"Utility preferences" is economists' jargon for describing the variety of tastes and desires of individual consumers. Any single viewer-consumer has his own preferences for television programming—as well as for a host of other ways in which he might spend his time. The difficulty arises when one tries to add together the preferences of large numbers of consumers to decide whether consumers as a whole are better off or worse off as a result of alternative sets of programming fare. Suppose the effect of the prime time access rule is to eliminate certain network programming and reduce the number of viewers watching any television program, or that different programs are watched than would be the case without the rule. Then, so the argument goes, the total consumer-viewer satisfaction is less than when the additional network programs were available. The problem with this analysis is that no one knows how much loss a viewer suffers by doing something other than watch television, or by watching one program rather than another. There is a question whether consumer satisfaction for individuals can be added at all. No one knows whether those viewers who stopped watching television, or shifted to other programs because of the prime time rule, are essentially indifferent to the change. Viewers who watch the programming that replaced network programming because of the rule may find the new programming greatly preferable to their prior alternatives. And even this analysis presupposes that television watching is a net consumer benefit. The viewer is not, of course, the consumer—he is the product

sold by the advertiser (who *is* the consumer). Programming is virtually irrelevant in such a market analysis. (Various forms of subscription television, by contrast, *do* turn the viewer into a market place participant in the program selection process.) Nor is television watching necessarily a benefit at all. See the Kerner and Eisenhower Commission Reports, the Surgeon General's Report on violence in children's programs, *How to Talk Back to Your Television Set* and *Test Pattern for Living*. Mason Williams has said, "I finally decided the best I could do for television was not at all." After observing the industry's insensitivity to the impact of programming and commercials on small children (during the FCC's children's television hearings) I was prompted to recommend legislation to Congress making it a felony for anyone to keep a television set receiver in a home containing children under the age of six. In short, I am not sure that "utility preferences" is a concept that can contribute much to our analysis of the prime time access rule. But as long as we give Nobel Prizes in economics for the idea, the least the FCC can do is to hear it out.

Statement of Commissioner Benjamin L. Hooks Concurring in Part; Dissenting in Part

IN RE: Notice of Inquiry and Proposed Rule Making in Prime Time Access Rule Matter.

There is no question in my mind that a re-examination of the direction and effect of the "Prime Time Access" Rules is necessary and desirable. I concur in initiating this analysis.

However, inasmuch as we are focused on the subject of Prime Time broadcast fare, I would have specifically requested an exploration—through comments and otherwise—of the possibility of requiring that a certain share of Prime Time be dedicated to local news and public affairs should the present Prime Time Access strictures be extinguished. See, in this connection, Notice of Inquiry In re: Formulation of Policies Relating to the Broadcast Renewal Applicants, stemming from the Comparative Hearing Process (F.C.C. 71-159, Docket No. 19154 released February 23, 1971), 27 F.C.C. 2d 580 (1971).

substantial number of network
select and present their own pro-
mit themselves in advance;[31] (b)
nilar audience objectives could
sponsorship of programs supplied
uld, if given a chance without be-
the lion's share of their potential
rs for the scheduling of programs
in situations such as that in (c)
sales could, if they chose to do so,
ms produced by independent pro-
Producers and talent agents got
r represented by them which are
nt producers could place programs
h one or several advertising agen-
ertising clients of such agencies;[32]
ly perform many functions in the
g sponsorship, could aid independ-
ost importantly, if networks choose
discounts to advertisers who were
ucers to bring in independent pro-
vhy under (f) above spot advertis-
olled shows could not be provided.
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d perform the entrepreneurial func-
ailability of minutes for small na-
alt problem as alleged in the com-
large part of their entertainment
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y be devised—additional minute op-
endents. Indeed the networks might
ct a referral service if their com-
ninutes would be served thereby.
orks that the industry would be ad-
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to adapt itself to changin gcondi-
eems preposterous[34] to say that ad-
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messages were presented. We agree
as there appears to be no substantial
ement and supply would be made and
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t less network program control will
The contention is made that adver-
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ommerce and where network control
ease and would be detrimental to
n fare. Such does not appear neces-

type of possible arrangement. Notice par.

about $14,000 more per half hour from
ork-controlled programs. This indicates
per year could be made available without
nts to encourage sponsors and others to
financial "risk" of program procurement.
56—only 9 years ago—the Antitrust Sub-
d programs filled roughly half of network
pendent producers will not rush to supply
opportunity. That is why the networks
y of the industry indicates that reasonable
ently produced programs encourages the

25a. A look at the record, not only of our inquiry but what has since occurred, shows that much of the criticism of television fare as bland, etc., is directed toward the network-chosen, hour-long film series which have become staple fare. These are the programs over which network managers exercise the highest degree of control. Programs independently produced for advertisers such as the Telephone Hour, the Hallmark Hall of Fame, Robert Montgomery Presents, National Geographic Society Documentaries, and numerous others were generally considered by critics to be bright spots in network schedules.

26. However, this argument is somewhat beside the point. As we have repeatedly emphasized, it is not our intention to set up standards of diversity and quality in television programing. What we intend is to encourage conditions of competition for network evening time and programs which will permit the harnessing of the widest diversity of marketing interests of American business which is economically feasible to the network program selection process. The history of television programing indicates that this would result in a greater diversity among individual programs. However that would be the decision of the marketplace. In our commercial television system program diversity—particularly in entertainment—can be little greater in the longrun than sponsors are willing to support. At present, network program procurement practices tend to restrict rather than promote such diversity. They tend to encourage mass circulation oriented advertisers and to discourage those whose advertising objectives or target audiences may be somewhat different and would require somewhat different type programs. It appears highly probable that the American business community provides a greater potential variety of economic need, and hence economic support, for diversity in television programs and program sources than present network practices bring to expression.

Dissenting Statement of Chairman Dean Burch in Which Commissioner Wells Concurs

The majority of the Commission has today acted on a proceeding that began with a notice in 1965, but whose origin really goes back over a decade. The thrust of my dissent is directed to the so-called prime time access rule (Formerly Westinghouse plan, formerly modified 50-50 plan).

The basis of this rule is that as of today, as evidenced by the data in the report and order, the three network organizations, ABC, NBC, and CBS, supply either through their own production efforts or through joint ventures with independent producers approximately 96.7 percent of the network programing which dominates the prime time viewing[1] hours. At the present time networks during the 7–11 p.m. (e.s.t.) time period feed 3½ hours of network programing, with 30 minutes being left for the stations themselves to supply out of their own resources. The rule would require that during this period (of 7–11 p.m. (e.s.t.)) the affiliates carry no more than 3 hours of programing, the net result being an additional 30 minutes per night of time which must be supplied by the local station, either from locally developed programing or from syndicated materials which they can purchase through the syndication market. One other proviso of the rule (which I will comment upon hereafter) is that during the 1-hour period from which network programing is to be excluded, the affiliated stations may not use an off-network syndication series or feature film previously broadcast in the market.

[1] Thus, network affiliates in 1968 carried an average of between 3.3 and 4.7 (depending upon size of market) hours a week of nonnetwork programing between the hours of 7–11 p.m. out of the total of 28 hours; between the hours of 7:30–10:30 p.m. the figure is from 1.2 to 1.6 hours.

The rationale for this rule goes somewhat as follows: The networks compete vigorously; however, they tend to parallel each other in programing. There is no healthy syndication market in this country because the sine qua non of syndication is access to prime time in the top 50 markets. Ergo, by making prime time available in the top 50 markets, a healthy syndication market will emerge, the competitive system will have been stimulated, and—presumably—the public will benefit.

I want to make it clear that I do not quarrel with the motives of the majority in this rulemaking, to the extent that they are hopeful—although, as I will show, Pollyannish—that this rule will in fact stimulate a healthy independent syndication market, and the public will be substantially enriched by new programing fare. I believe that an unstated premise of the rule adopted today, and one which I think must be faced, is that if a majority of the Commission were satisfied with the present network product, this rule would be deemed unnecessary. I thus believe that, despite protestations to the contrary, the rule is basically a reflection of the Commission's judgment that programing today does not satisfy its standards of diversity. Another parallel unstated premise is the assumption that because of economic motives the networks are purposefully depriving the public of the programing to which it is entitled.

Before proceeding to a discussion of the rule itself, it is necessary to say a word about the pattern of network programing today; namely, that the networks themselves produce or coproduce some 97 percent of the programing. Thus, as to the three networks combined, network participation in all evening (6–11 p.m.) programs rose from 38.5 percent in 1957 to 80.4 percent in 1968, a figure which, when added to the number of network produced shows, reveals a rise from 67.2 to 96.7 percent. Stated differently, independently provided shows decreased from 32.8 percent in 1957 to 3.3 percent in 1968. Similar figures reflect the trend when only entertainment shows are looked to (see par. 12, report and order).

There are a number of reasons for this development, but the prime one is simply economics. Programing is expensive; advertisers have insisted during the past few years on availability of 30-second commercials and have not been interested in sponsoring complete shows. Whether this is good or bad, it is a fact.

The costs of network quality programs have risen enormously. In 1957 a 30-minute network show could be produced for approximately $15,000; in 1968, its cost was $87,000 per half hour, whereas today the information available to the Commission indicates that a 30-minute network quality color show will cost the producer from $100,000 to $150,000.

Quite obviously, the foregoing facts pose a serious problem to entrepreneurs who seek to provide quality shows to stations. The networks can meet these problems because, by the very nature of networking, they can and do deliver, even without option time, the great majority of their affiliates during prime time on an established economically feasible interconnected basis, and are uniquely able to sell spots to national advertisers in the manner now desired by such advertisers.

Again, let me say that I am not necessarily defending the system, but I think that we must face reality rather than what we might hope and these are the facts today.

With this as background, I turn to what I believe is a fatal flaw in the reasoning of the majority. That reasoning is that, given access to prime time in top markets, syndicators will immediately produce quality programing which will be made available to the stations because it will be profitable to the syndicator and to the station. The real problem with the rule is that this premise has not been demonstrated to be true, and, in fact, the evidence before the Commission presently indicates that it is indeed faulty. Why? Simply because the syndicator, even though assured of a shot at the prime time of affiliates in the top 50 markets, can certainly not be assured that his program is going to be selected by a sufficient number of stations in such markets. Even if the program is selected under existing economics and tax structures, it is quite clear that very great amounts of capital will be required to produce programing, with much of this capital having to be amortized for a long period of time. The fractionated top 50 market is simply not sufficient to sustain the expensive programing effort here required. In short, today in the programing field, money is the name of the game, and unfortunately, the Commission, despite its plenary power to regulate, cannot so easily regulate the laws of economics.

Thus, taking the majority's action at face value, I believe that it is an economic mistake—that it will not produce the result sought, a healthy television film producing market.

Let me turn briefly to another aspect—whether it will result in diversity of programing. Assuming that the rule does have substantial or some efficacy, I strongly believe that there will be little, if any, contribution to real diversity of programing. What will be produced under the aegis of this rule will simply be more of the same—more games, more light entertainment along proven formulas, more "emcee" talk shows. Both the producer and the affiliate will inevitably drift very largely to the sure thing—the tried and true—because of the economics of the system under the rule; indeed, those economics may well dictate programing produced with reduced resources. Time will of course supply the definitive answer here, but unfortunately for the viewing public, I feel confident that my assessment will prove correct.

It may be argued that so what? Why not try this approach, and if it does not work, return to the drawing board. But there is an old medical adage, "First, above all, do no harm to the patient." The Commission today violates that prescription in several important ways.

First, the public in the top 50 markets will be deprived of significant amounts of popular high quality network fare in the prime viewing hours, and in my judgment of the economics, that fare will not be replaced by the equivalent high quality, first-run syndicated programing visualized by the majority. Second, in the smaller markets, it is also clear that there will be a similar deprivation, and indeed, one which will have a much larger adverse impact upon the stations and consequently the viewing public in those markets. The rule purports to exempt the markets below the top 50. In practical effect, there is no such exemption. Here again the economics give the answer; to produce

and distribute very costly programs for markets which represent only a small percentage of the population is simply not feasible. The networks have indicated that they will not continue to feed 3½ hours of programing just for the below 50 markets, and while the Commission may talk of ordering the waves to roll back, it is just not practical.

This has much more serious consequences for these markets. There is simply not the same advertising base for relatively high cost programing in these markets. The stations may therefore be unable to maintain such programing, even assuming arguendo that it would be supplied by nonnetwork sources.

Third, the rule purports to benefit the new UHF independents coming on the air. But here again the practicalities undermine the theory. Because of the rule, the VHF stations will be seeking more nonnetwork programing, and are in a position to outbid the struggling new UHF, which depends almost entirely on such programing. Because of this consideration, the association of UHF broadcasters (ACTS) recently and in strong terms counseled that the rule will hurt, not help, UHF.

Finally, there is the consideration of the effect on enhanced dissemination of news programing. The originally proposed rule (so-called 50-50) would have exempted newscasts, news interviews, etc., and specifically requested comment on whether news documentaries should be exempted. I fully agree with the exemption in the rule adopted for on-the-spot coverage of news events, and political broadcasts. I disagree, however, with the majority's failure to exempt news interviews and most importantly, the news documentary and the newscast which are, after all, the chief means of informing the public on events and issues. When the question of exemption for the present rule came before the Commission, the majority, aware that the networks could avoid the impact of the rule by extending the 30-minute evening news show into a 1-hour news show, determined not to exempt the newscast. In my opinion, if this rule had resulted in additional prime time news programing—the thing which network television can and does do best—that would have been a benefit to the entire country. Because of its stated concern over the syndication market, the majority forecloses this possibility. The majority also forecloses the possibility of an enhanced number of news documentaries, and indeed may be inducing a cutback in such programing. I strongly believe that the Commission cannot properly adopt a policy of subordinating news programing, which informs the public and is surely not in oversupply, to entertainment programing, which exists in far greater amounts and seeks but to amuse. So on this ground also, I believe that the rule is seriously defective; however, even if remedied in this respect, the rule would still be undesirable, for the other reasons developed.

There is a procedural matter which also concerns me greatly. Immediately prior to the final adoption of the rule in the open rulemaking proceeding, the Commission, through telegrams, letters, and other presentations, learned that the west coast syndication market itself, the very people who are supposed to be helped by this rule, were greatly concerned that in fact they would be harmed because

their major source of income—the networks—would cut back on programing. This point of view was reinforced by a great number of the California labor organizations as well as knowledgeable people from all parts of the industry. These very interested persons requested the Commission to adopt a tentative rule, which would be subject to comment by all interested parties and then, on such a full record, adopt the rule in final form, with such revisions as are appropriate. This procedure, which the Commission recently followed in the computer proceeding (docket No. 16979), seemed to me to be most reasonable, and I therefore moved its adoption. This was denied on the ground that the matter has been kicking around for 5 years, had been subject to full opportunity for comment, and should now be acted upon. I am in sympathy with the idea that we should not take 5 years to do anything, but nevertheless, in the face of mounting evidence that the rule, rather than being beneficial, might actually be harmful, the better part of administrative valor would surely have been to go along with the suggested procedure. I repeat that the first requisite of Commission action is not that it act, but that it act with reasonable assurance of promoting the public interest.

Further, I do not believe that there has been such full opportunity to develop a record on the rule adopted by the Commission. Take, for example, an important part of the rule, the proscription in subsection (3) of 73.658(k) of off-network program series and feature films previously broadcast in the market, in the time period from which network programing is barred. This was not proposed by the Commission, and there has been no record developed on this important aspect. Thus, the Commission today has no data whatsoever as to the economic impact of this particular provision, both on the efficacy of the rule and upon the contractual arrangements of the stations. To what extent, for example, have these affiliated stations purchased series or feature films, with the express purpose (and payment therefor) of presenting them in prime time? What is the effect on the syndicators and the film producers—the persons sought to be helped by this rule? Granted, these are all economic concerns, but, as I have stated before, economics is really what this rule is all about, and the Commission should at least have had up-to-date information in this field before acting.

The Commission does state in paragraph 38 of the Report and Order that it will consider some of these matters on a motion for reconsideration. This is contrary to good administrative procedure, and indeed to commonsense. If there is a substantial question as to the efficacy of the rule, that question should be reached prior to adoption of the rule, not after. Otherwise, the matter smacks of sentence first, judgment later. This Commission has only so many regulatory arrows in the quiver and when it takes a major step such as this rule, it should be taken with full knowledge of all the pertinent facts and after consideration of all the potential benefits and harms that might flow from the rule.

Having set forth my objections to the procedure and substance of the rule, I want to address one last aspect of this rule and indeed of regulatory philosophy in general. The proponents of this rule will argue there is a problem and the Commission has acted to meet that

problem. In other words, rather than cursing the darkness, they have lit a candle. My answer to that is simply, "Yes, there were and are a number of candles available but in my opinion, this is not one, but rather a sky rocket—flashy, momentarily pleasing, but with no substance." Since we are dealing with economics, if the Commission really wishes to make available to the public diverse programing, it must encourage a different economic base for program presentation. Quite obviously, so long as a broadcaster has only one channel on which to operate, his economic requirements will tend to make him program that one channel for a mass audience. Accordingly, minority needs or tastes will be denied or underserved. This means, in turn, rather than spending years on a rule of this nature, the Commission must concentrate on the obvious alternatives which have a different economic base and thus may make a genuine contribution to diversity. These alternatives do exist and have not yet come to fruition.

First, there is subscription television, which has a different economic base and can present programing that is not necessarily designed for a mass audience and still be economically attractive for an entrepreneur. There is cable casting, a technology which makes multiple channels available and which by its very nature changes the entire economics of programing.

There is the noncommercial educational television system, which, with sufficient and appropriate funding, can make a tremendous contribution to diversity.

Nevertheless, the Commission has moved ahead with this rule—in my opinion simply because it was there. Although it is difficult in this day and age to make specific forecasts as to what will happen, I predict—unhappily—that if this rule is adopted in its present form, after the passage of a few years, there will be no genuine benefit to the independent film industry at least sufficient to offset the detriments to the broadcaster and most importantly to the viewing public. The rule may shift some dollars from one pocket to another and maybe this is good. It may very well harm the networks to some extent, great or large, and in some people's minds, this seems to be worthwhile. In conclusion, while respecting the motives and objectives of the majority in this case, I simply feel that they have wasted the resources and energies of this Commission in a futile effort to administratively tamper with the economics of programing as it exists rather than attempting to create a situation where the economics could make sense.

Concurring Statement of Commissioner Kenneth A. Cox

I concur fully in the action here, though there are some respects in which I would have liked to do things differently. I would like to add some individual comments, primarily addressed to Chairman Burch's dissenting statement.

I share some of his concerns. Like many actions the Commission takes, the resolution of this matter is not guaranteed to produce the results we seek. However, based on the record in this long proceeding and on study of this problem for over 14 years, I think this is the most logical and effective step we can take to correct a serious problem.

C. The independent licensees want to keep the rule because it has presented them with opportunities to make short-term gains in ratings, revenues, and profits. The rule might harm them long-term, however, as the supply of off-network Hollywood produced syndicated programming, on which their existence depends, begins to decrease and, because of supply and demand, to cost more.

D. Most of the network affiliated stations in the top-50 markets, and many in markets below the top-50, want to keep the rule, as does ABC. NBC, at first opposed to the rule, is now neutral.

E. The independent producers of taped programs, mostly game shows, want to continue the so-called prime-time access 'experiment,' as do the importers of foreign made television series.

POSSIBLE POLICY ALTERNATIVES:

If the main purpose of the prime-time access rule was to lessen network control of the airwaves, and since this purpose seems to have been defeated in the sense that the networks, and their five owned and operated stations, still dominate television broadcasting in America, perhaps some overall policy alternatives ought to be investigated and given further research emphasis by the FCC, and other governmental and non-governmental bodies in the future:

1. Some consideration might be given to the overall extent to which the networks allegedly dominate television broadcasting. Each network has five owned and operated stations in top markets. All three networks have owned stations in New York, Los Angeles, and Chicago--

the first, second, and third largest markets in the U.S. accounting for something like 19 percent of the total television households. ABC has its other two owned stations in the sixth and seventh largest markets, San Francisco and Detroit, respectively, which account for a further 4.7 percent of America's television households. CBS has an owned station in the fourth largest market, Philadelphia, and in the twelfth, St. Louis, which together account or another 4.8 percent of the nation's television households. NBC has its other two owned stations in the eighth and ninth markets, Cleveland, Ohio, and Washington, D.C., respectively, which together account for 3.8 percent of television households. Consequently, ABC has access to almost 24 percent of the nation's television households through its owned and operated stations; CBS also has access to almost 24 percent of total television households; while NBC has access to almost 23 percent of total television households. (National television spot revenue, however, is disproportionately higher in the O & O markets, ranging from 32 to 35 percent of the national total, but part of that is due to the fact that there are more stations, and competition is fiercer, in the larger markets. Not only are the three networks a tripoloy in the distribution of programming nationally, they also own the three most powerful groups of stations. These two factors, in addition to their program making functions, make them the most powerful instituions in American broadcasting today, and critics claim that it is that power, concentrated in a few hands, that has inherent and potential anti-trust dangers. If, after research and investigation, that is deemed to be the case, then the networks could be made to divest themselves of one or all of their owned and oper

stations. There is need for careful consideration of this possible policy alternative, however, since the networks have argued quite forcefully that the reason they are able to be innovative and experimental in their programming, and to be the major suppliers of costly national and international news, instant news specials, documentaries, and sports programming, is because of their financial strength in American broadcasting. If the networks were made to divest themselves of their owned and operated stations, their financial power would be weakened, perhaps seriously, and such programming mentioned above would, probably, suffer. In addition, economists still differ about the alleged dangers of vertical integration and the networks may be able to put forward compelling 'public interest' arguments for having the control they have.

2. The FCC could work more closely in support of the Justice Department's anti-trust suits against the three networks. The intent of these suits is to get the networks out of the entertainment program making business, i.e., programs other than news, public affairs, documentary, and sports. These suits are based on the fact that the networks produce and distribute programs and buy programs from companies that do not own any distribution facilities, yet have to compete with the networks in the sale of programming. This situation has anti-competitive dangers in the sense that the networks can, theoretically keep down the price of entertainment programming supplied by independent production houses based on the networks' assumed capacity to extend their own production should the independent suppliers prices become too high. In their defense, the networks say they need tape facilities for their news and sports programming, and, since tape

facilities were first developed by the networks as an extension of live television, they should be left untouched because they are essential to network operation. In the area of film, the networks say they need to be free to experiment with, and develop, their own sources of programming. The networks' also claim that owning facilities is different from owning programs, and they now own very few programs.

3. The FCC could investigate ways of strengthening the nation's independent VHF and UHF stations allowing them to compete more effectively with the three networks. Policy favoring development of a fourth network is handicapped by a shortage of markets within independent VHF stations--only 14 of the top-50 markets have an independent VHF station.

4. Consideration might be given to the ways and means of financing and enhancing the public television network as a viable alternative to the commercial networks.

5. The newer technologies, for example cable and pay television, could be encouraged and stimulated in an attempt to establish another competitive broadcasting system that might be able to meet the programming needs of minority audiences in a more efficient manner.

The networks' could argue that it was never the intention of the prime-time access rule to make structural changes in the broadcasting industry, and that the above policy alternatives are thus irrelevant. The rule, they say, was merely intended to take away from the networks a daily half-hour and hand it over to their affiliates. In this case,

the rule has been successful.

The remainder of this report will be devoted to a detailed analysis of the economic consequences of the prime-time access rule on the various interested parties.[1]

SECTION II: THE NETWORKS

INTRODUCTION

As we have seen, the three networks—ABC, CBS, and NBC--dominate television broadcasting in America. Seven days a week, year round, the networks offer programming during most of the day to their local affiliates in roughly 200 markets throughout the country. The networks buy or produce this programming, and sell commercial minutes within this programming, which is then aired by their local affiliates. In return, the local affiliates are paid what is known as station compensation--usually roughly a third of what they could get if they took an additional risk and programmed their own material--and they are also allowed to sell short segments of time in the network programming, known as station breaks or adjacencies, which are often very valuable because of the higher rating levels of many network shows.

All three networks usually carry fewer minutes of advertising than are allowed under the National Association of Broadcasters Code:

[1] AUTHOR'S NOTE: Much of the detailed information presented in this report was given to the author by confidential sources who prefer not to be identified in footnotes. Most of them have agreed to have their names included in the list of people interviewed--See Appendix I.

TIME/LIFE BUILDING • NEW YORK, N.Y. 10020 • 212 • 556 3000

November 19, 1973

Chairman Dean Burch
Federal Communications Commission
Washington, D. C.

Dear Chairman Burch:

We understand the FCC is scheduled to take final action November 28 on staff recommendations for amendments to the Prime Time Access Rule. We also understand that there is customarily a 30-day waiting period from the time the Commission acts until that action and changes, if any, are made public.

We urge you, in this instance, to waive the 30-day delay and announce the Commission's action as soon as possible.

Time-Life Films has delayed long overdue production commitments on access-time properties scheduled for 1974 release because it cannot proceed until it knows what changes, if any, the Commission is going to adopt. Further delay to the end of the year would bring us past the fail safe line for the type of quality productions we want to bring to market, in keeping with the level of programming we are sure the Commission intends the Rule to encourage.

At this point in time, each day, let alone the entire 30-day period, becomes absolutely critical. We will appreciate any positive consideration you afford this request. Thank you very much.

Respectfully submitted,

Lee Heffner

smm

Affidavit of Service

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD SUTTON, being duly sworn, deposes and says:

1. That he is over the age of 18 years, resides in the State of New York and is not a party to the action.

2. That on the 1st day of April, 1974 he served:

a) Motion for Leave to Intervene on Behalf of Samuel Goldwyn Productions.

b) Motion for Leave to Intervene on Behalf of National Committee of Independent Television Producers.

c) Answering Brief of Intervenors National Committee of Independent Television Producers, Samuel Goldwyn Productions, Warner Bros. Inc., Columbia Pictures Industries, Inc., and MCA, Inc.

d) Supplementary Appendix of Intervenors listed in small c) above.

upon the following attorneys at the addresses designated by them for that purpose:

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Said service was made by depositing a true copy of each document enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Edward [illegible]

Edward [illegible]

Sworn to before me this

1st day of April, 1974.

[illegible]

Notary Public